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No. 88-2031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Petitioners,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,
Respondents.

BRIEF OF FREE SPEECH ADVOCATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

THOMAS PATRICK MONAGHAN
Free Speech Advocates
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454
Attorney for Amicus Curiae

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. DOES THE POSTAL SERVICE'S BAN ON SOLICITATION, WHICH IS PROTECTED BY THE FREE SPEECH AND FREE PRESS CLAUSES OF THE FIRST AMENDMENT, GO FAR BEYOND PERMISSIBLE REGULATION OF A FORUM?

II. DOES THE POSTAL SERVICE'S BAN ON RESPONDENTS' FIRST AMENDMENT ACTIVITIES INVOLVE IMPERMISSIBLE CONTENT-BASED DISCRIMINATION IN A TRADITIONAL PUBLIC FORUM OR AN OPEN FORUM AND NOT A CONTENT-NEUTRAL TIME, PLACE OR MANNER REGULATION?

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MARSHA B. KOKINDA AND KEVIN E. PEARL,

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BRIEF OF FREE SPEECH ADVOCATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

Free Speech Advocates is a legal defense organization dedicated to protecting, preserving and defending the right of freedom of speech in public forums throughout the United States.

Counsel for amicus has specialized in litigation in both state and federal courts with regard to various First Amendment issues. Amicus believes that the experience of his counsel would be of assistance to the court in this case.

Amicus is particularly concerned by a disturbing tendency to undermine cherished First Amendment freedoms by the attempt to privatize publicly owned property which has traditionally been utilized as a forum for expressive activities.

The parties in the present case have consented to the filing of this brief; letters granting consent are being submitted with this brief.

STATEMENT OF THE CASE

Marsha Kokinda and Kevin Pearl, volunteers for the National Democratic Policy Committee, set up a table on the sidewalk in front of the Bowie, Maryland post office on August 6, 1986, and distributed literature addressing a variety of political, health and welfare issues. J.A. 17.

There is only one functional sidewalk at the Bowie, Maryland post office. The sidewalk, which is approximately seven feet wide, is located on postal service property and is used to enter the post office lobby. Pet. App. 12a; J.A. 96. The parking lot is between the postal sidewalk and the municipal sidewalk, and both are set back from a public road. J.A. 95.

After seeing respondents' table and their literature,[1] and after hearing second hand about complaints from

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[1] The facts in this case establish that respondents' table did not block the sidewalk. J.A. 71. To the contrary, the sole

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postal patrons, although, "[t]he record is completely silent as to the nature or focus of the . . . complaints,"[2] *United States v. Kokinda and Pearl*, 866 F.2d 699, 702 (4th Cir. 1989), Postmaster Larry Poe asked respondents to leave. When respondents refused to discontinue exercising their First Amendment rights, the Postmaster returned with Postal Inspector Julius Cochran, who arrested respondents and seized their table and literature. J.A. 19-20.

Respondents were charged, in an Information filed August 8, 1986, with solicitation of contributions on postal service property in violation of 39 C.F.R. § 232.1(h)[3]; with refusal to comply with the lawful

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complainant to testify clearly stated that it was solely the, "bumpers from the cars that protrude over the edge," of the sidewalk that forced her to, "get down." J.A. 62.

[2] These complaints may very well have been based upon the content or viewpoint of respondents' message. J.A. 70; *Kokinda*, 866 F.2d at 704.

[3] 39 C.F.R. § 232.1(h) (formerly 39 C.F.R. § 232.6(h)): *Soliciting, electioneering, collecting debts, vending, and advertising.* (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited. This prohibition does not apply to:

(i) Commercial activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;

(ii) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;

(iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized by the Manual on Fund Raising Within

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directions of postal authorities to leave postal service property in violation of 39 C.F.R. § 232.1(d)[4]; and with refusal to leave the grounds of a public building in violation of Md. Code Ann. Art. 27, § 577(A)(1987) and 18 U.S.C. §§ 7 and 13.

At a bench trial before United States Magistrate James E. Kenkel on November 18, 1986, Respondents were convicted on the first two counts of the Information, with the third count being merged into the second. Kokinda received ten days imprisonment and a $50.00 fine, and Pearl received thirty days imprisonment and a $100.00 fine.[5] Pearl's sentence was suspended, and he was placed on nine months probation.

Respondents appealed their convictions to the United States District Court for the District of Maryland. Three basic issues were raised and have been preserved by respondents. First, that Section 232.1 (the "Regulation"), both on its face and as applied to their conduct, violates their rights under the First Amendment and under the

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the the [sic] Federal Service, issued by the Chairman of the U.S. Civil Service Commission under Executive Order 10927 of March 13, 1961.

The Manual on Fundraising requires that solicitation on postal sidewalks may occur only with the authorization of the head of the federal agencies, yet no written or objective guidelines exist to inhibit the exercise of arbitrary discretion in the grant or denial of such authority.

[4] *Conformity with signs and directions.* All persons in and on property shall comply with official signs of a prohibitory or directory nature, and with the directions of security force personnel or other authorized individuals.

[5] The Magistrate noted his personal opinion at the sentencing hearing that respondents' activities were, "not particularly altruistic at all."

Equal Protection Clause of the United States Constitution,[6] which includes their claim that the evidence against them was unlawfully seized without probable cause. Second, the evidence was insufficient to sustain their convictions. And third, that the Maryland trespass statute is unconstitutionally vague.

The district court rejected the First Amendment challenge to the regulation and affirmed the convictions. The memorandum and order of the district court is unreported.

Kokinda and Pearl appealed to the United States Court of Appeals for the Fourth Circuit. The opinion of the court of appeals is reported at 866 F.2d 699 (4th Cir. 1989).

The court of appeals found that respondents were engaged in, "classic political speech pursued peacefully in a place that 'traditionally ha[s] been held open to the public for expressive activities and [is] clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.' " *United States v. Kokinda and Pearl*, 866 F.2d 699, 702 (4th Cir. 1989) (citations omitted).

The Court of Appeals struck down the Regulation and overturned respondents' convictions.[7]

The Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was filed on April 14, 1989, and was granted on October 2, 1989.

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[6] Petitioner does not deny that solicitation is protected speech under the First Amendment. Br. of Appellee at 4. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640 (1981).

[7] The judgment of the court of appeals was entered on January 31, 1989, and a petition for rehearing and suggestion for rehearing en banc was denied on April 14, 1989.

ARGUMENT

I. THE POSTAL SERVICE'S BAN ON SOLICITATION, WHICH IS PROTECTED BY THE FREE SPEECH AND FREE PRESS CLAUSES OF THE FIRST AMENDMENT, GOES FAR BEYOND PERMISSIBLE REGULATION OF A FORUM.

A. The Postal Sidewalk Adjacent to the Bowie Post Office Is A Traditional Public Forum.

1. The Disputed Subject Property Is A Sidewalk Which Is Imbued With A Presumption That It Is A Public Forum.

"The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 44 (1983).

The outdoor postal sidewalk, which is in that category of publicly owned property which is historically devoted to expressive activities, is the relevant forum:

> In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry, 460 U.S. at 45 (citations omitted).

Respondents call the disputed subject property a "sidewalk," as the Fourth Circuit correctly concluded it is. Petitioner prefers the term "walkway." The Court of Appeals found petitioner's characterization of the post office sidewalk "unpersuasive." This concrete structure was constructed to facilitate pedestrian traffic for members of the general public, however, and is functionally

and physically indistinguishable from any municipal sidewalk.[8]

As a "sidewalk" the Bowie post office concrete structure is imbued with a presumption that it is a public forum because, as this Court has oft stated, "streets, sidewalks, and parks, are considered, without more, to be 'public forums.' " *United States v. Grace*, 461 U.S. 171, 177 (1983). "[S]idewalks . . . are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968).

Whether owned by a municipality or the postal service, the sidewalk herein is undoubtedly a public forum:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. C.I.O., 307 U.S. 496, 515-516 (1939) (Opinion of Roberts, J.).

2. Postal Sidewalks Functional Characteristics Are Determinative Of Their Status As A Public Forum.

It is the communicative character, pattern of activity, and purpose of post offices that make the sidewalks leading to them public fora. Postal sidewalks are used much like other undisputed public fora, such as busy city streets and sidewalks. *Grace*, 461 U.S. at 178-80; *Hague*,

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[8] In contrast, see *Greer v. Spock*, 424 U.S. 828 (1976), involving a sidewalk which was constructed principally or primarily to facilitate pedestrian traffic of a defined population and was enclosed within a secured military installation.

307 U.S. at 515-16. The post office is just like any other business located along a sidewalk off the street, with members of the general public coming and going as they please. Its status as a freestanding establishment is not unique to post offices.

Functional similarity to municipal sidewalks, the paradigmatic public forum, has been determined by this Court to be a relevant consideration. This Court's holdings in *Greer v. Spock*, 424 U.S. 828 (1976), and *Grace*, for instance, turned not so much on the physical characteristics of the sidewalks there at issue, or by whom they were owned, as they did on the functional characteristics of those sidewalks, including the purpose for which the forum is dedicated and the incompatibility of the proposed activities with accomplishing that purpose.[9] Physical or architectural distinctions were considered only in the context of whether they put a reasonable person on notice that the property was dedicated to a use inconsistent with expressive activity.

Accordingly, the questions of general public access and compatibility of solicitation with the subject forum – whether the protected activity causes disruption of the function of the forum – are the overwhelming considerations in evaluating the status of the subject forum. Petitioner agrees it is the functional use to which the subject forum is put that predominantly determines its status as a forum. Brief of the United States, at 13, 29.

Petitioner cannot, merely to avoid inconvenience, transform the character of public forum property simply by including it within what may otherwise be considered

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[9] *Greer v. Spock*, 424 U.S. 828 (1976) (basic *function* of military installation to exclude civilians), and *United States v. Grace*, 461 U.S. 171 (1983) (traditional public forum does not lose its character because property abuts is dedicated to a use other than as a forum for public expression).

a nonpublic forum parcel of property.[10] *Grace*, 461 U.S. at 180; *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

The First Amendment has always bound all three branches of the federal government.[11] Petitioner's attempt to privatize postal sidewalks must fail. Likewise, petitioner's attempt to delegate responsibility for compliance with the commands of the First Amendment, whether to the Chief Executive or to the Postal Service, also must fail.[12] *Grace*, 461 U.S. at 180.

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[10] The circuit courts addressing the question have reasoned that the public forum status of a public place cannot be made to turn on architectural distinctions. *Kokinda*, 866 F.2d at 703; *National Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1015 (4th Cir. 1973) (walls and roof cannot insulate against First Amendment). *See also, Rosen v. Port of Portland*, 641 F.2d 1243, 1245-46 (9th Cir. 1981); *Wolin v. Port of New York Authority*, 392 F.2d 83, 89-90 (2nd Cir.), *cert. denied Port of New York Authority, et al. v. Wolin*, 393 U.S. 940 (1968).

[11] There can be no serious dispute that the First Amendment applies to postal property. The First Amendment arguably did not even apply to municipal sidewalks until this Court's decisions in *Gitlow v. New York*, 268 U.S. 652 (1925), and *Stromberg v. California*, 283 U.S. 359 (1931). Petitioner conceded in the court of appeals that municipally owned sidewalks are public fora. Br. of Appellee at 6. Petitioner also admitted in the court of appeals that the sidewalk at issue herein would be a public forum, structural factors notwithstanding, if a municipality owned the property. Br. of Appellee at 6. Ironically, the United States now argues that the municipal sidewalk is the measure against which is determined the nature of a federal sidewalk, arguing that the postal sidewalk, "is clearly distinguishable from the other municipal sidewalks." Petition for Rehearing and Suggestion for Rehearing En Banc, at 5.

[12] The federal government may not, whether directly or indirectly through any of its forms or agencies, abdicate its constitutional responsibilities any more than it may delegate

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3. First Amendment Activities May Be Conducted On Postal Sidewalks Regardless of *Perry* Because The Public Has a General Right of Access to Postal Sidewalks And Solicitation Is Compatible With Postal Uses.

"[O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). It is inappropriate to apply the three-category *Perry* test to general public access property to determine whether the government has maintained the option to discontinue access because the question of access is not in issue.

As this Court noted in *Jews for Jesus*, "at least one commentator contends that Perry does not control a case such as this in which the respondents already have access . . . and therefore concludes that this case is analogous to *Tinker*." *Airport Comm'rs. of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 573 (1987) (citations omitted), citing Laycock, *Equal Access and Moments of Silence; The Equal Status of Religious Speech by Private Speakers*, 81 Nw.U.L.Rev. 1, 48 (1986).

The view that the forum analysis set forth in *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983), should not be applied where the public has a general right of access is indeed consistent with the approach of this Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). None of this Court's prior cases in which a forum was held to be

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its powers. *E.g., Evans v. Newton*, 382 U.S. 296 (1966) (government may not deny equal access to a public park by placing it in a trust); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (government may not deny equal access to a public restaurant by leasing it to a private party).

nonpublic involved forums to which there was both general public access and compatibility of First Amendment activities with the activities for which the forum was designed.[13] The public has been granted virtually unrestricted access to postal sidewalks.[14] In contrast to the forums at issue in cases such as *Greer*, the post office sidewalk forums are not dedicated to specific users.

Once a general right of access has been established, as in this case, the issue becomes one of compatibility of the protected activity with the use to which the subject forum is dedicated. This Court, in the past, has looked to the nature of the property and its compatibility with expressive activity as a factor in the government's intent to open a public forum. See *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (compatibility with policy); *Madison Joint Sch. Dist. v. Wisconsin Empl. Rel. Comm'n*, 429 U.S. 167, 174 n.6 (1976)(compatibility with statute).

As the Court of Appeals recognized, respondents' activities were not incompatible with the other purposes for which post office sidewalks were dedicated, and may accommodate other uses simultaneously, including use as

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[13] See for example *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (utility poles); *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280-82 (1984) (meetings between public employees and their employees' exclusive collective bargaining representatives); *U.S. Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 129-30 (1981)(letterboxes where mail must be secure); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974)(paid advertising cards on buses); *Adderly v. Florida*, 385 U.S. 39, 41 (1966)(utilization of jail houses); *Perry*, 460 U.S. at 51 (teachers' mail system); *Cornelius v. N.A.A.C.P. Legal Defense & Education Fund*, 473 U.S. 788 (1985) (Combined Federal Campaign); *Greer*, 424 U.S. at 828 (military base); *Brown v. Louisiana*, 393 U.S. 131 (1966).

[14] The government is foreclosed from contesting whether the public already has a general right of access to postal sidewalks. See 39 C.F.R. § 232.1(b) (1986).

a forum for peaceful expression of political views. *Kokinda*, 866 F.2d at 702.

As the Court of Appeals put it, "The critical distinction for First Amendment purposes is not between leafletting and solicitation, but between political expression which is disruptive and that which is not." *Kokinda*, 866 F.2d at 704. Not a shred of evidence appears in the record that the First Amendment activities presently allowed by the Postal Service are incompatible with the efficient operation of the Post Office.[15]

The fact that postal sidewalks are accessible for a variety of expressive activities proves there is basic compatibility of First Amendment and other nonmail activities with postal sidewalk uses. 39 C.F.R. § 232.1(h)(1)(i)(1986); J.A. 38. For instance, the existence of solicitation on a postal sidewalk is unlikely to be a factor in a person's decision whether or not to utilize a post office.

In enacting the present regulation, the Postal Service has said, "It is emphasized that the new regulation does not prohibit the distribution of literature." 43 Fed. Reg. 38,824 (1978).[16] Free distribution is permitted on postal

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[15] Petitioner's request that this Court defer to congressional factfinding on this point must be refused because it is this Court's, "task in the end to decide whether congress has violated the Constitution. . . . 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' " *Sable Communications of California, Inc.*, 492 U.S. ___, ___, 106 L.Ed.2d 93, 107, 109 S.Ct. 2829, 2838 (1989), *quoting Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). Moreover, there are no findings to which to defer because even a cursory examination of the record in this case reveals that there are no, "legislative findings that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest . . . " *Sable*, 492 U.S. at ___, 106 L.Ed.2d at 107, 109 S.Ct. at 2838.

[16] *See National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717, 722-23 (7th Cir. 1984); *United States v. Bjerke*, 796 F.2d 634, 646 n.1 (3rd Cir. 1986).

sidewalks. Brief for the United States, at 43, 45. In addition, picketing is permitted.

Despite the allegedly exclusive dedication of post offices to provide efficient mail services, the Postal Service performs or permits a variety of nonmail services that impede the efficient trafficking in mail. Nonmail activities not only countenanced on postal property, but actually performed by the Postal Service include, but are not limited to, conducting housing surveys and collecting information for the Red Cross. *E.g.*, 39 U.S.C. §§ 404(a)(6), 411 (1982); 39 C.F.R. §§ 111.5(i)(4), 259.1(d)(1)(1986), 259.2 (1986). Nonpartisan civic organizations also have access to postal sidewalks. *Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Serv.*, 812 F.2d 1194 (9th Cir. 1987); *American Postal Workers v. U.S. Postal Service*, 764 F.2d 858 (D.C. Cir. 1985).[17]

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[17] 39 C.F.R. § 259.1

(d) *Housing Vacancy Surveys.* (1) General. An interagency agreement between the U.S. Postal Service (USPS) and the Federal Home Loan Bank Board (FHLBB) establishes the terms and conditions and reimbursement rates under which USPS will conduct Housing Vacancy Surveys in City Delivery offices when requested by FHLBB.

39 C.F.R. § 259.2 Red Cross.

(b) *Role of Postal Service.* The Postal Service and the Red Cross will share information on the whereabouts of persons displaced by disasters, and otherwise cooperate with each other, as follows:

> (1) The Red Cross will use Form 3575, Change of Address Order, as a standard item in Red Cross disaster relief. It will urge disaster victims displaced from their homes to obtain and complete the forms, it will distribute the forms to disaster victims who need them, and it will collect from the victims and turn over to the Postal Service any completed forms received.

Indeed, prior to 1978 Postal Service regulations permitted solicitation even *inside post office lobbies.*[18] Access was limited to designated groups and activities on a content-discriminatory basis. The old regulation, which permitted solicitation indoors, was found to disrupt activities conducted in the lobby. It can hardly be argued that solicitation on outdoor postal sidewalks is likely to cause the same disruption as solicitation conducted in inside postal lobbies.

B. In Addition To Being A Traditional Public Forum, The Bowie Post Office Sidewalk Is Also An Open Forum Because It Has Been Opened For Expressive Activity.

Public property which has not traditionally been used for expressive activities, but which the government has opened to the public for that purpose, is subject to

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[18] Even a cursory review of the legislative history of Petitioner's Regulation reveals that the rationale for the Regulation rests squarely on experiences with solicitation *inside* post office lobbies, and not on the likely effect of solicitation outside on postal sidewalks:

> Since the act of solicitation of alms and contribution usually has as it [sic] objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. . . . Such confrontations, *if occuring [sic] in the confines of a small post office lobby,* at a post office writing desk or service window, or in a queue at a service window – places from which the individual cannot escape if he or she wishes to transact postal business – *would be likely to produce hostile reactions and to cause people to avoid post offices.*

43 Fed. Reg. 38,824 (emphasis added).

The Postal Service ought not be permitted to criminalize compatible and nondisruptive First Amendment activity on outdoor sidewalks to which there is general public access on the asserted justification that solicitation inside postal buildings might cause disruption of postal business. *Tinker, supra.*

the same constitutional standards as a traditional public forum, "even if it was not required to create the forum in the first place." *Perry*, 460 U.S. at 45.[19]

Although the government argues that it has not opened post office sidewalks for indiscriminate solicitation, petitioner is powerless to deny that these very sidewalks are open for nonmail activities, indiscriminate free distribution of literature, picketing, solicitation of signatures and solicitation of funds from postal employees.

Free distribution of literature and picketing are permitted on outdoor postal sidewalks, and a variety of First Amendment activities are sanctioned to take place in indoor postal lobbies. 43 Fed. Reg. 38,824 (1978). Brief for the United States, at 4. The Postal Service does not deny that some charitable fund-raising activities have occurred on postal property.[20] Through its own Regulation and

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[19] Petitioner does not dispute that, with respect to an open forum, "Any restriction on free speech on such property must also be bound by the same constitutional limitations that govern traditional public forums." Br. of Appellee, at 5.

[20] Br. of Appellee, at 9. In addition to permitting free distribution, solicitation is permitted at post offices, on a discriminatory basis, pursuant to 5 C.F.R. § 950.311(b) (1986), which provides in pertinent part:

> Sec. 950.311 Off-the-job solicitation at places of employment. (b) Public Entrances of Federal Buildings and Installations.
>
> Voluntary agencies that engage in limited or specialized methods of solicitation – for example, the use of "poppies" or other similar tokens by veterans' organizations – may be permitted to solicit at entrances or in concourses or lobbies of Federal buildings or installations normally open to the general public.
>
> And although petitioner argues only postal employees may be solicited thereunder, the determination of who may solicit is indisputably discriminatory.

tradition, the Postal Service has acknowledged that postal sidewalks have not been limited to postal uses. Rather, they have been opened to the full range of public forum activities.

Petitioner's argument that post office sidewalks are closed fora is therefore unpersuasive because post office sidewalks are readily available to the general public for indiscriminate expressive activities other than solicitation of funds for political causes.[21] In fact, petitioner admits such unrestricted access exists, and mistakenly asserts such constitutes an "ample alternative channel of communication." Brief for the United States, at 43-44.

C. Petitioner Has Impermissibly Attempted To Ban Respondents' First Amendment Activities In A Traditional Public Or Open Forum.

Protected expressive activities may not be banned in a public forum.[22] Yet the Regulation is a ban of protective activity in a public forum, and may not be considered a manner or place – all public forums may not be considered one fungible place – regulation. The ban on solicitation constitutes neither a reasonable manner nor place restriction. This court has warned that regulations prohibiting entire categories of expression often will fail to withstand constitutional scrutiny. *Grace*, 461 U.S. at 182-83; *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).

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[21] Those who can finance their activities elsewhere have free reign on post office sidewalks, while those who cannot afford alternative means of fundraising – such as mailing solicitation requests – are foreclosed from espousing their political viewpoint to postal patrons.

[22] Communicative activity may not be banned in traditional public or open forums. *Perry*, 460 U.S. at 45. Nor may a manner of expression be banned. *Ward v. Rock Against Racism*, 491 U.S. ___, ___, 105 L.Ed.2d 661, 682-83, 109 S.Ct. 2746, 2760 (1989).

It cannot fairly be characterized as a place or manner regulation when a categorical ban is employed in the name of administrative convenience.[23] "Here the government has determined that an entire category of speech – [expressive activity coupled with solicitation] – is not to be permitted." *Ward, supra* (1989), citing *Boos v. Barry*, 485 U.S. 312, 320 (1988) (opinion of O'Connor, J.).

D. The Postal Service's Ban Is A Presumptively Unconstitutional Prior Restraint.

The ban is a prior restraint because the Postal Service, "enjoy[s] unguided discretion to deny the right to speak altogether."[24] *Ward v. Rock Against Racism*, 491 U.S. at ___, 105 L.Ed.2d at 677, 686, 109 S.Ct. at 2755, 2763 (1989). Laws which impose prior restraints on the exercise of First Amendment bear a heavy presumption of unconstitutionality because, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[25] *Nebraska*

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[23] The Regulation "prohibit[s] . . . [s]oliciting . . . alms and contributions . . . on postal premises." The Postal Service has determined that a total ban eliminating an entire manner of First Amendment activity from postal premises is preferable to a content-neutral time, place, or manner regulation, because, "the prohibition [is] preferable to any attempt to permit solicitation under regulation as to time, place, and manner." 43 Fed. Reg. at 38,824. Petitioner admits it has imposed, "a categorical ban . . . " Brief for the United States, at 16.

[24] This Court has stressed that, "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication." *Near*, 283 U.S. at 713.

[25] Although legislative enactments ordinarily enjoy a presumption of constitutionality, this Court has clearly stated that:

> 'Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantum Books, Inc. v. Sullivan,*

(Continued on following page)

Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Facially invalid prior restraints on First Amendment activities may be ignored with impunity.

To meet that heavy burden, prior restraints must be accompanied by rigorous procedural safeguards. See for example *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

In addition, a prior restraint aimed at communicative impact, such as the Postal Service Ban, must be the least restrictive means of protecting the government's interest. *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977). See also, *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963).

The Postal Service ban, pursuant to the Order of this nation's Chief Executive, imposes the censorship of a prior restraint, "by a simple stroke of the pen." *Ward v. Rock Against Racism*, 105 L.Ed.2d at 686, 109 S.Ct. at 2763 (Marshall, J., dissenting), *quoting* Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648, 657 (1955).

As attested to by the Inspector, the regulation lacks, "the procedural safeguards necessary 'to obviate the dangers of a censorship system.' " *Id., quoting Freedman v. Maryland*, 380 U.S. 51, 58 (1965). The manager or Postmaster at each facility determines that classification of individuals that are to be permitted to solicit. In the present case, the decision was based on what Cochran thought, although he is not even authorized to make the determination:

(Continued from previous page)

> 372 U.S. 58, 70 (1963); see also *Near v. Minnesota*, 283 U.S. 697 (1931). The government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

A: I think the Postmaster can make that determination and I felt that these people did not fit into that class of individuals who could make solicitations on postal property.

Q: Are you authorized to make such a determination?

A: No.

Q: Then you're saying it was your personal opinion that they didn't fit into this classification?

A: After discussion with the Postmaster, I felt that they did not fit into that classification.

J.A. 30.

II. THE POSTAL SERVICE'S BAN ON RESPONDENTS' FIRST AMENDMENT ACTIVITIES INVOLVES IMPERMISSIBLE CONTENT-BASED DISCRIMINATION IN A TRADITIONAL PUBLIC FORUM OR AN OPEN FORUM AND IS NOT A CONTENT-NEUTRAL TIME, PLACE, OR MANNER REGULATION.

A. The Postal Service's Ban On Solicitation Is Content Based Because It Is Not Justified Without Reference To Content.

Government may not discriminate on the basis of the content of a speaker's message. The Regulation is content based because its applicability depends upon whether or not the words respondents speak include a request for a donation, and therefore inherently requires regulators to investigate what respondents' are saying. As a content-based restriction on political speech in a public forum, it must be shown that the postal service's regulation is, "necessary to serve a compelling [governmental] interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45 (1983). Accord *Airport Com'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987).

This Court has stressed that petitioner may not grant use of a forum to persons whose views it accepts but deny use to respondents, whose views it opposes:

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*. [376 U.S. 254, 270 (1964).]
>
> Once a forum is opened to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone and may not be justified by reference to content alone.

Police Department v. Mosley, 408 U.S. 92, 95-96 (1972).[26]

Petitioner has admitted that the Regulation permits some organizations to solicit funds at entranceways to post offices, but not others. Br. of Appellee, at 14. The ban is also content based because the Red Cross, the Lions Club, the Minnesota Star and Tribune, and the Kiwanis are permitted to solicit to the exclusion of respondents, which is an expression of favoritism of one content over another. Brief for the United States, at 15, 31. *See* 43 Fed. Reg. 38,824. *See also Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Service*, 812 F.2d 1194 (9th Cir. 1987); *Jacobsen v.*

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[26] *See also, First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n*, 429 U.S. 167 (1976); Notes, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854 (1983).

U.S. Postal Service, 812 F.2d 1151 (9th Cir. 1987); *United States v. Bjerke*, 796 F.2d at 643, 656.

The regulation authorizes certain forms of charitable solicitation, yet categorically bans all political solicitation. *See* J.A. 38. Executive Order 12,404 provides for an annual Combined Federal Campaign (CFC) to solicit contributions for, "voluntary health and welfare agencies."[27] That same Order expressly disqualifies those agencies engaged in political solicitation. The Director of the Office of Personnel Management is instructed to develop criteria to implement the Order, but no objective, written guidelines exist as yet to dissuade the exercise of arbitrary official discretion in the application thereof.

The ban is tantamount to a content-based regulation, and must be measured as such, because as a prior restraint, " 'in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid,' in order to ensure that discretion is not exercised based on the content of speech." Ward, 105 L.Ed.2d at 686, 109 S.Ct. at 2763, quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *see also Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. ___, 100 L.Ed.2d 771, 108 S.Ct. 2138 (1988); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969).

Accordingly, the determination as to which charitable organizations may be permitted to solicit contributions, and which causes are sufficiently altruistic to warrant access, has been based upon the content of the speaker's

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[27] Executive Order 12,404 (1983), of February 10, 1983, is codified at 3 C.F.R. 151 (1984), which superseded Executive Order 12,353 (1982), codified at 3 C.F.R. 139 (1983).

message.[28] *Boos v. Barry*, 485 U.S. 312, 320 (1988) (opinion of O'Connor, J.).

Thus, no guidelines exist defining who is authorized to solicit, who is authorized to determine who is authorized to solicit, what constitutes "normal business" or what is "disruptive of and disturbing to" normal business. J.A. 31-32. The First Amendment does not countenance open invitations to engage in the exercise of arbitrary official discretion.[29]

The Postal Service has laid bare its motivation to suppress respondents' viewpoint:

> The thrust is that these supporters can no longer collect monies on our exclusive property. If this is properly handled these *Lyndon LaRouche Supporters will obviously not make any money* and therefore have no need to stand in and around post offices . . . [i]f all postal personnel work together, the matter will be resolved.

Postal Service Memorandum Re Case No. 595-16001 – ECM(3), Pittsburgh Metro Area (Dated July 25, 1986), Reply Brief of Appellants (Appendix A).

B. The Government Has No Compelling Interest In A Complete Ban Or A Content-Based Regulation.

The Postal Service established a blanket ban, and specifically rejected a time, place, or manner regulation because, in their view, "prohibition was preferable to any attempt to permit solicitation under regulation as to time,

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[28] That determination is also impermissibly made by reference to the sensibilities of postal patrons who are free to complain because they disagree with the speaker's viewpoint. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988).

[29] In addition to rendering the challenged enactment void as a content-based regulation, it therefore also is void for vagueness in violation of respondents' due process rights. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *New York v. Ferber*, 458 U.S. 747 (1985).

place and manner." 43 Fed. Reg. 38,824. The government has unnecessarily attempted to impose a complete ban. "Surely, [sic.] this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957), *quoted with approval Sable, supra*. Petitioner mistakenly relies on *Heffron*, 452 U.S. at 647, and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), because in those cases, "The issue of a total ban was not before the Court." *Sable*, 492 U.S. at ___, 106 L.Ed.2d at 106, 109 S.Ct. at 2837.

The issue is not whether postal sidewalks are congested – postal sidewalks have crowds with or without solicitation – but whether postal sidewalks' congestion is so increased by such activities that the Postal Service has a compelling interest in quashing First Amendment rights. The Postal Service has failed to establish any "compelling interest" because a sweeping prohibition cannot be based on the potentiality of a "parade of horribles."[30] *Tinker v. Des Moines School Dist.*, 393 U.S. 503,

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[30] As the court of appeals correctly determined:

> The record in this case reveals no evidence of a significant [let alone compelling] government interest best served by the ban on solicitation in a public forum. There is no evidence that Kokinda and Pearl's solicitation obstructed or impeded postal customers. Appellants were not charged with obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. *See* 39 C.F.R. § 232.1(e) (1986). There is nothing to suggest that they harassed, threatened, or physically detained unwilling listeners. . . . The government's interest in preventing the obstruction or disruption of post office business or the harassment of postal patrons can be readily addressed by the less restrictive alternative of prohibiting directly such obstruction, disruption or harassment.

Kokinda, 866 F.2d at 704-705.

508 (1969). This Court in *Tinker* held that undifferentiated fear or apprehension of disturbance is not enough to suppress freedom of expression.

Discharging governmental obligations is by definition somewhat inconvenient. A content-neutral regulation which not only preserves the property for its primary function, but which does so not at the expense of preserving our fundamental liberties, can be created, and there therefore can be no compelling reason to enact a sweeping ban.

The Postal Service was created to provide prompt, reliable and efficient postal services. 39 U.S.C. § 101(a) (1982). Thus the Postal Service has a legitimate interest in adopting regulations to prevent disruption and hindrances to the conduct of postal business. 39 U.S.C. § 401(2) (1982); 43 Fed. Reg. 38,824. For the Regulation to be upheld it must be reasonably related, on its face and as applied, to preventing disruption of postal business. "The government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. at ___, 105 L.Ed.2d at 675, 109 S.Ct. at 2754 (1989).

Petitioner points to "aesthetics" as an interest furthered by the ban. Brief for the United States, at 14. Clearly petitioner has no compelling reason to subjugate respondents' First Amendment rights based upon some faceless bureaucrat's untethered opinion of what is aesthetically pleasing.[31] *Id.*, at 2754-2755.

Petitioner also points to competition with private mail delivery services. Brief for the United States, at 15, 34-35. Not one iota of data is hinted at to suggest past solicitation diminished postal business in the least. To the contrary, the only witness testified she was not dissuaded

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[31] A sweeping prohibition of protected expressive activity may not be banned entirely from a traditional public or open forum on the purported justifications of uniformity and administrative efficiency. *Greenburgh*, 453 U.S. at 132-33.

from doing postal business. J.A. 62-63. Further, no competition exists for regular mail and stamps. Competition is further a red herring because private shipping businesses which abut a public forum must coexist with First Amendment activities, yet are lacking entirely in the ability even to regulate the time, place, or manner thereof.[32]

Nor is there a right of postal customers to be free from the "annoyance" of being exposed to views with which they disagree. Brief for the United States, at 36. As discussed at II.E., since no such right exists, petitioner can have no compelling interest in preserving such right.

C. A Content-Based Ban Is Not Narrowly Tailored To Further A Compelling Governmental Interest And Is Not The Least Restrictive Means To Accomplish Any Interest.

Even assuming arguendo the government has a compelling interest, the content-based ban burdens substantially more speech than is necessary to further the government's interests. "A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Ward*, 491 U.S. at ___, 105 L.Ed.2d at 681, 109 S.Ct. at 2758, *citing Frisby v. Schultz*, 487 U.S. ___, 101 L.Ed.2d 420, 108 S.Ct. 2495 (1988).

Herein, "a substantial portion of the burden on speech [fails] to advance its goals." *Ward*, 491 U.S. at ___, 105 L.Ed.2d at 681, 109 S.Ct. at 2763. The ban on solicitation fails to advance the asserted goal of preventing obstructions of the sidewalks. To prevent obstructions of the sidewalk, petitioner should implement reasonable

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[32] Even the governments in Eastern Europe no longer can claim the right to douse the inherent right, let alone the power, of citizens to engage in political expression and protest.

time, place, or manner regulations, and should not enact sweeping prohibitions of respondents' First Amendment activities.[33]

Even if respondents' convictions are reinstated, there is nothing in the solicitation ban to prohibit their setting up a table tomorrow and distributing their literature for free.

All solicitation is banned, even speaking to someone in the corner of a sidewalk in front of a door that is unused. J.A. 33-34, 40. Solicitation is banned at all times, even at non-peak times, and including when the post office is closed. Thus activities are banned regardless of the risk they create of a disruptive impact or the correlation of the ban with petitioner's interest. It is difficult to conceive that no solicitation activities are ever appropriate in any of the 35,000 postal properties presently in operation.

When the Postal Service adopted the applicable anti-solicitation regulation in 1978, it explained that:

> [T]here are omitted from the replacement regulation certain provisions of the previous regulation which allowed the use of postal lobby space for fundraising campaigns of nonprofit organizations. *The use of lobby space* for such activity has been highly unsatisfactory. Most postal lobbies are layed [sic.] out for the sole purpose of providing efficient service and cannot therefore accommodate non-postal activities without disturbing postal employees in the performance of

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[33] The inconveniences complained of, "are not unique to solicitation; they would also attend the mere distribution of literature from a table on the sidewalk. They could be better avoided by regulating the size and placement of the tables than by the imposition of a ban." *Kokinda*, 866 F.2d at 705. In short, none of the alleged problems is, "a problem that a ban on solicitation is narrowly tailored to avoid. Regulations limiting . . . would appear to address the problem more directly." *Id.*

> their duty and impeding the public in transacting postal business; additionally, the use of lobbies only by nonprofit philanthropic and charitable organizations for fund raising has come to be viewed as unjustifiably discriminatory by some excluded individuals and groups. Deletion of this provision of the regulations would correct the operational and legal problems.

43 Fed. Reg. 38,824 (1978). No explanation regarding the regulation's application to postal sidewalks was provided.

A prophylactic ban is not the least restrictive means of accomplishing any governmental interest, and does not further any such interest. Petitioner admits that, "less restrictive measures might be devised . . . "[34] Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, at 12.

The government's plea that their previous attempts at narrow tailoring, "proved virtually unworkable," is insufficient to dispense their constitutional responsibilities. Brief for the United States, at 41. Postal regulators are not expected to be First Amendment experts, but certainly counsel with expertise could devise a livable regulation. A first-come first-serve permit would not be hard to manage, time consuming, or viewed as content-based.

An example of such a means were promulgated in 1980 by the Federal Aviation Administration ("FAA") for Washington National and Dulles airports. The FAA concluded a ban was unnecessary overkill. 45 Fed. Reg. 34,314, 35,315-17 (1980). The FAA adopted one neutral

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[34] Neither the Magistrate or the District Court considered the existence of less restrictive alternatives. "Section 232.1(e) demonstrates the feasibility of drafting more narrowly tailored regulations." *Kokinda*, 866 F.2d at 705.

regulation applicable to solicitation and free distribution alike. Access is granted to a reasonable number of people to solicit, "on a 'first come, first serve' basis." 14 C.F.R. § 159.93(b)-(e). There is no reason to believe this less restrictive alternative would not work on outdoor postal sidewalks when the FAA concluded high security, congested airports could tolerate solicitors. 45 Fed. Reg. 35,315.

The postal service ban is not narrowly tailored, as a content-based restriction, because, "a less restrictive alternative is readily available." *Boos v. Barry*, 485 U.S. at 330.

D. The Ban Provides No Alternative Nor Ample Alternative Channels Of Communication On Postal Service Property.

Solicitation may not be banned because there is no practical alternative means of soliciting funds.[35] Respondents are left with no economically feasible or realistic alternative on postal property because, "passing motorcars are not an inviting audience for speech or solicitation." *Kokinda*, 866 F.2d at 702. J.A. 95.

Contact and interaction, let alone meaningful contact and interaction, occurs only on the sidewalk immediately contiguous to the post office building. Although the sidewalk on the far end of the parking lot is a municipal sidewalk, in reality it is merely a buffer strip between the parking lot and the roadway, and is not utilized as a

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[35] The "booth rule" in *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (open forum), for example, was upheld by this Court only because an ample alternative channel of communication was available *in the same forum:* the fairgrounds. In contrast, the government herein seeks to expel the First Amendment entirely from the subject forum.

pedestrian thoroughfare.[36] Respondents do not have access to any functional postal sidewalk, and cannot deposit their literature in private mailboxes, *Greenburgh, supra*, and accordingly have no means of access to postal patrons. Nor is mailing of solicitation requests an economically viable alternative because mailing requests costs money, whereas distributing their materials from postal sidewalks does not.[37]

E. Inconvenience Is the Price of Liberty.

"[C]itizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine*, 485 U.S. at 52. In fact, "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' " *Texas v. Johnson*, 491 U.S. at ___, 105 L.Ed.2d at 356, 109 S.Ct. at 2541 (1989), *quoting*

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[36] As elaborated upon by the Inspector in Charge of the Pittsburgh Metro Area these, "alternative sidewalks" are subject to state and local restrictions on First Amendment uses. Respondents may therefore apparently resort only to the sovereign who acts last. Presumably, the sovereign's regulation last enacted must fall to accommodate the earliest suppressor of our cherished freedoms.

[37] Petitioner's attempt to relegate respondents to such an alternative reveals the Postal Service's ban is perhaps motivated by a competitive motive and a desire to force respondents to pay petitioner to solicit contributions. Solicitation is protected because it, "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular cause or for particular views . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg*, 444 U.S. at 632.

Terminello v. Chicago, 337 U.S. 1, 4 (1949). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at ___, 105 L.Ed.2d at 360, 109 S.Ct. at 2544 (1989). Nor may distribution of literature when combined with the solicitation of funds which, "is essential to the poorly financed causes of little people," be denied broadly and absolutely. *Martin v. Struthers*, 319 U.S. 141, 147-48 (1942).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

THOMAS PATRICK MONAGHAN
Free Speech Advocates
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454